

**To:** Erin Foresman/R9/USEPA/US@EPA[]  
**Cc:** "Toland, Tanis J SPK" [Tanis.J.Toland@usace.army.mil]  
**From:** "Nepstad, Michael G SPK"  
**Sent:** Thur 7/14/2011 3:10:55 PM  
**Subject:** FW: DWR changes to 404 MOU - Quick Heads Up (UNCLASSIFIED)

Classification: UNCLASSIFIED

Caveats: NONE

FYI

-----Original Message-----

From: Monroe, Jim [mailto:James.Monroe@sol.doi.gov]  
Sent: Wednesday, July 13, 2011 4:14 PM  
To: Nepstad, Michael G SPK  
Cc: 'Tom Hagler'  
Subject: FW: DWR changes to 404 MOU - Quick Heads Up

Mike,  
I got a delivery failure the first time I tried to send this.

Jim

From: Monroe, Jim  
Sent: Wednesday, July 13, 2011 4:12 PM  
To: 'Tom Hagler'; Allen, Kaylee; Deanna.Harwood@noaa.gov  
Cc: Robershotte, Paul J SPD; Michael.G.Nepstad@; Nawi, David; Lisa H Clay  
Subject: RE: DWR changes to 404 MOU - Quick Heads Up

Tom,  
I would suggest that Ebbin's insistence that the conveyance changes be labeled "conservation measures" is intended by Marc to affect the context in which he will argue that the USACE should be defining the basic purpose of the conveyance to be. Actions intended to be "conservation measures" are understood to have the purpose of affirmatively improving the condition of any listed species affected by the conservation measure, toward an intended ultimate objective of recovery (point at which the species no longer requires protection under the ESA). So now there would be two basic project purposes: 1) Diversion of water to consumptive use and 2) Listed (fish) species conservation.

This could then be further argued to allow the exclusion from the 404(b)(1) alternatives analysis conveyance alternatives that do not meet the (ostensible) intended conservation purpose of the water contractors' contemplated changes in the Delta's plumbing.

Of course (and because consistency is important) I continue to maintain that while it is possible that the re-plumbing of the Delta may make channel depletions that result from the diversion of water for consumptive use less bad for (some of) the listed fish in those channels (mitigation in the form of minimization), taking water out of the river will always be hard to be understood as making that river better for the fish in it than it would be if the water was not taken out.

I am fine with your paragraph regarding EPA involvement.

Jim

James A. "Jim" Monroe, P.E.  
Assistant Regional Solicitor  
USDOJ Office of the Solicitor  
Pacific Southwest Region  
2800 Cottage Way, Room E-1712  
Sacramento, CA 95825  
(916) 978-5674  
(916) 978-5694 (fax)  
James.Monroe@sol.doi.gov

From: Tom Hagler [mailto:Hagler.Tom@epamail.epa.gov]  
Sent: Wednesday, July 13, 2011 2:20 PM  
To: Monroe, Jim; Allen, Kaylee; Deanna.Harwood@noaa.gov  
Cc: Robershotte, Paul J SPD; Michael.G.Nepstad@  
Subject: DWR changes to 404 MOU - Quick Heads Up

DWR's suggested changes are minimal, but two of them may raise issues for the fish agencies:

- (1) DWR wants to remove references to the NCCP, and instead refer to "state take permits." I think this change is in line with what I heard from Mark Ebbin last week to the effect that the contractors want to retain the option of NOT doing this as an NCCP but rather as a CESA state permit.
- (2) DWR wants to call all of the projects, including all of the conveyance changes, "conservation measures."

Neither of these are EPA/Corps issues, but I thought I should see whether either change is problematic given your ESA discussions.

Also, DWR wants something in there explaining why EPA is involved at all. I was going to add a paragraph up front that describes the roles of the Corps and EPA on 404 permitting. Something like this:

"The USACE has exclusive jurisdiction for implementing RHA Section 10 and Section 408. Administration of CWA Section 404 is divided, by statute, between USACE and EPA. As relevant to this MOU, the USACE administers the permitting program by processing individual and general permits, determining Clean Water Act jurisdiction, and conducting compliance assistance. EPA is responsible for oversight, including writing regulations that must be followed in issuing 404 permits, developing policy and guidance, determining the scope of geographic jurisdiction, reviewing and commenting on individual permit applications, and, where appropriate, objecting to or vetoing individual 404 permits."

Your comments on any of this are appreciated.

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Tom Hagler  
Assistant Regional Counsel  
U.S. Environmental Protection Agency  
Region 9  
75 Hawthorne Street, RC-2  
San Francisco, California 94105-3901  
Phone: (415)972-3945

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Caveats: NONE